Supreme Court, U.S.
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In The

Supreme Court of the United States

ART K. EDWARDS, et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA, DEPARTMENT OF ENERGY (DOE); LOCKHEED MARTIN ENERGY SYSTEMS, INC. (LMES); UNITED STATES ENRICHMENT CORPORATION (USEC),

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Prior to June 29, 2000, did the Petitioners have knowledge that the Respondents did not intend to transfer the "surplus fund" associated with their retirement benefits from their "old pension fund" to their "new pension fund?"

LIST OF PARTIES

ART K. EDWARDS; JAMES H. CHESNUT; VELVA YEOMANS; CHUCK HOBBS; B. J. BOND; TOM EMERSON; HARRY P. COLBERT; C. R. BEVERLY; BILL D. PENRY; TYRONE T. SIVELS; BILL LINDSEY; and CARL W. WALTER

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STATUTE

USEC Privatization Act (42 USC Section 2297h-8(a)(2)) ..... *passim*

OPINION BELOW

The Sixth Circuit Court of Appeals did not select its opinion for publication in the Federal Reporter. The decision is reported at 2006 U.S. App. Lexis 20854. The District Court published an opinion in this case. Its opinion is reported at 371 F.Supp. 2d 859 (W. D. Ky. 2005).

JURISDICTION

The Sixth Circuit filed its decision on August 11, 2006, and entered an Order denying Petitioner's Motion for Rehearing on October 31, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari.

STATUTORY PROVISION INVOLVED

(42 U.S.C. § 2297h-8(a)(2)) provides:

2297h-8. **Employee** protections

(a) Contractor **employees**.

(2) In the event the private corporation terminates or changes the contract at either or both of the gaseous diffusion plants, the **plan sponsor** or other appropriate fiduciary of the pension plan covering **employees** of the prior operating contractor shall arrange for the transfer of **all** plan assets and liabilities relating to accrued pension benefits of such plan's participants and beneficiaries from such plant to a pension plan sponsored by the new contractor or the private

corporation or a joint labor-management plan, as the case may be. *(Emphasis added).*

STATEMENT OF THE FACTS

The central issue in the underlying action involves the interpretation and implementation of the *USEC Privatization Act*. The trial court dismissed this action concluding that the action had not been commenced within the four (4) year statute of limitations.

As the Court would expect, the issues involving the interpretation and implementation of the *USEC Privatization Act* were briefed in detail to the lower courts. In order to correctly apply the Statute of Limitations, it is necessary to understand how the *USEC Privatization Act* was implemented. Thus, a history of the *USEC Privatization Act* and its implementation is relevant.

Petitioners are retirees, who retired from various contractors who operated the Department of Energy (DOE) facility at the Paducah Gaseous Diffusion Plant (PGDP) located in Paducah, Kentucky. During the formation of the United States Enrichment Corporation (USEC), these retirees were moved out of the Lockheed Martin Energy Systems, Inc.'s (LMES) pension plan and into the USEC pension plan. The "surplus fund" associated with the Petitioners' pension plan was not transferred with the Petitioners but rather left in the "LMES pension plan" and, as a consequence of the transfer, the surplus fund for the "LMES pension plan" grew even larger. Shortly after the transfer of the Petitioners to the "USEC pension plan," the beneficiaries of the "LMES pension plan" received two different increases in their benefits funded in part by the

surplus funds created by the transfer of the Petitioners to the "USEC pension plan."

Petitioners assert that the *USEC Privatization Act* was specific legislation which required the transfer of a proportional share of the surplus funds associated with their pension benefits to the "USEC pension plan."

The relevant portion of the *USEC Privatization Act* (42 USC § 2297h-8(a)(2)) provides:

> 2297h-8. **Employee** protections
>
> (a) Contractor **employees**.
>
> (2) In the event the private corporation terminates or changes the contract at either or both of the gaseous diffusion plants, the **plan sponsor** or other appropriate fiduciary of the pension plan covering **employees** of the prior operating contractor shall arrange for the transfer of **all** plan assets and liabilities relating to accrued pension benefits of such plan's participants and beneficiaries from such plant to a pension plan sponsored by the new contractor or the private corporation or a joint labor-management plan, as the case may be. *(Emphasis added).*

A Senate Report titled "Senate Report 104-173-USEC Privatization Act" offered a "Section by Section" analysis of the *USEC Privatization Act*. The relevant portion of that Senate Report states:

> Section 10 – **Employee** protections
>
> Subsection (a) provides for the protection of **employees** at the gaseous diffusion plants in Kentucky and Ohio in the following manner:

> Pens[illegible] Plans: Paragraphs (1) and (2) of subsection (a) specify that privatization will not diminish the accrued, vested pension benefits of the plant's operating contractor **employees**, and that, in the event the private corporation terminates or changes the operating contractor at either or both of the gaseous diffusion plants, **(the appropriate fiduciary of the pension plan covering contractor) employees will arrange for the transfer of the assets (including any surpluses)** and liabilities of the pension plan to the extent that they relate to accrued pension benefits of the plan's participants and beneficiaries for the relevant gaseous diffusion plant to the pension plan sponsored by the new contractor, the private corporation (if it operates the plant without an operating contractor), or a joint labor-management plan as appropriate. *(Emphasis added).*

As briefed to the lower courts, the Petitioners assert that the interpretation of the *USEC Privatization Act* requires the Court to consider the legislative history. This particular piece of legislation and its Senate Report were "joined at the hip" as the legislation was considered by the members.

Petitioners further assert that the *USEC Privatization Act* is specific legislation and it consequently trumps any general legislation such as *ERISA* and the *Internal Revenue Code*. It is undisputed that Respondents applied sections of *ERISA* and the *Internal Revenue Code* to avoid transferring any portion of the "surplus fund." It is also undisputed that there was a "surplus fund" which was not transferred to the USEC Pension Plan and retained in the LMES Pension Plan.

USEC terminated the LMES contract on May 18, 1999, and thus triggered the provisions of 42 USC § 2297h-8(a)(2). On May 24, 2000, USEC and LMES entered into a "Pension Plan Asset Transfer Agreement" which designated the "Initial Transfer Date" as July 1, 1999, and the "Final Transfer Date" as June 30, 2000. This Agreement was not a published document and there is no evidence or assertion in the record that the Petitioners were ever provided notice of this Agreement or its contents. The lower courts determined that the Petitioners claim began accruing on May 24, 2000. However, the Agreement was not even fully executed with the acknowledgment and consent of DOE until June 6, 2000. There is simply no evidence establishing when the Agreement (which is not written in layman's terms) was provided to the Petitioners. In the lower court's Petitioners contended that the earliest possible date they could have received notice was the date established as the "Final Transfer Date," but in reality, the actual date that the Petitioners received notice of the contents of the "Pension Plan Asset Transfer Agreement" was well after the "Final Transfer Date" of June 30, 2000. The Petitioners filed their complaint on June 29, 2004.

Beginning on page 13 of the "Pension Plan Asset Transfer Agreement," DOE assumes the liability of LMES with regard to the "Pension Plan Asset Transfer Agreement." Specifically the Agreement provides:

> Any right and/or interest which is acquired by LMES under this Agreement shall pass directly from LMES to DOE or its designee(s) at the discretion of DOE upon notice to USEC. The obligations and rights of LMES under this Agreement may be transferred, in whole or in part, to DOE or its designee(s) at the discretion of DOE upon notice of such transfer to USEC, and to the

> extent of such transfer and notice thereof to USEC, LMES shall have no further responsibilities hereunder. Notwithstanding anything in this Agreement to the contrary, in the event the LMES or any successor or transferee pursuant to this section 7 is unable to fulfill any of its obligations, financial or otherwise under this Agreement, then DOE should be obligated to fulfill such obligations about LMES or any of its successors or transferees pursuant to this section 7.

In the acknowledgment and consent portion of the "Pension Plan Asset Transfer Agreement," DOE agreed to be bound by the terms and conditions of the Agreement. Specifically, the Agreement states,

> The undersigned hereby agrees to be bound by such terms and conditions to the extent that such terms and conditions are imposed on it by the Agreement and hereby consents to such terms and conditions.

REASON FOR GRANTING THE PETITION

Petitioners assert that the Sixth Circuit Court of Appeals' decision conflicts with the previous decisions of this Court in determining when a plaintiff is time barred from "the enforcement of Federally created equitable rights." *Holmberg v. Armbrecht*, 327 U.S. 392, 66 S. Ct. 582, 90 L.Ed. 743 (1946).

Robertson v. Tennessee, 399 F.3d 792, 794 (6th Cir. 2005) (*quoting Hughes v. Vanderbilt University*, 215 F.3d 543, 548 (6th Cir. 2000) stands for the position that courts should take "a **common sense** approach to this task, inquiring as to what event should have alerted the typical

lay person to protect his or her rights." *(Emphasis added).* In addition, these proceedings involve a question of exceptional importance; in that, the opinion determines whether the Petitioners have initiated this class action in time to contest the failure to transfer a surplus fund of an amount that exceeds $100,000,000.

Petitioners' Argument for Granting the Petition

The *USEC Privatization Act* became public law on April 26, 1996. Upon the occurrence of certain events, the *USEC Privatization Act* required the Respondents to transfer "all assets and liabilities related to accrued pension benefits" to a new pension plan. 42 USC § 2297h-8(a)(2). The last and most significant piece of legislative history which accompanied the *USEC Privatization Act* to the floor votes of both the House and Senate was Senate Report 104-173 which offered a "section by section" analysis of the USEC Privatization Act. The relevant portion of that Senate Report explained that the Respondents "will arrange for the transfer of the assets (including any surplus) and liabilities of the pension plan."

Petitioners assert that as laymen they were certainly entitled to interpret the USEC Privatization Act and the **"section by section" analysis** which accompanied the Act to the floor for its vote to mean that the transfer of assets relating to their pension plan would eventually include the surplus fund. Petitioners assert that "common sense" suggests that if the members of Congress were using a **"section by section" analysis** to help them understand the USEC Privatization Act, the typical lay person should be afforded the same luxury. There is simply nothing confusing about what is meant by the words

contained in the **"section by section" analysis**. No party or court has ever proffered any other possible explanation for the words "including any surplus" other than the fact that the drafters intended for the surplus to be transferred. Petitioners assert that the question for the Court to determine is when should common sense have had the effect of alerting the Petitioners that the Respondents were not going to transfer the surplus.

The lower courts determined that the Petitioners' statute of limitations began to run on May 24, 2000, which was the date that USEC and LMES partially executed the "Pension Plan Asset Transfer Agreement." However, the "Pension Plan Asset Transfer Agreement" was not fully executed until Respondent, DOE, signed the acknowledgement and consent portion of the "Pension Plan Asset Transfer Agreement" on June 7, 2000.

Furthermore, the terms of the "Pension Plan Asset Transfer Agreement" specified two different dates for the transfer of assets: (1) the first was the "Initial Transfer Date" (July 1, 1999) which actually pre-existed the date of the agreement, and (2) the second was the "Final Transfer Date" on June 30, 2000. The trial court apparently misunderstood the Petitioners' argument as to when the statute of limitations began to run. In the lower courts, the Petitioners asserted that the statute of limitations could not have begun to run before June 30, 2000, which was the "Final Transfer Date" for the "Pension Plan Asset Transfer Agreement." However, the actual date that the Petitioners could have received notice of the contents of the "Pension Plan Asset Transfer Agreement" was well after the "Final Transfer Date" of June 30, 2000. Probably because there has been no discovery as to the issue of when the Petitioners could have learned that the Respondents were not

going to transfer the surplus fund, the courts have been somewhat confused as to what was public knowledge, what could have been known about the terms of the "Pension Plan Asset Transfer Agreement," and when that knowledge could have been learned.

This is significant for inquiry, as Circuit Judge Batchelder expressed in her concurrence:

> " . . . passage by Congress of the Privatization Act in 1996 could not have given the petitioners reason to know of a claim arising from a transfer that occurred over four years later on May 24, 2000. In addition, the May 12, 1999, letter from [LMES] to the petitioners, although relied upon by the district court, also gave the petitioners no reason to know of their claim."

However, Circuit Judge Batchelder went on to conclude that the combined effect of the December 21, 1999, LMES plan amendment, together with the content of the "Pension Plan Asset Transfer Agreement" of May 24, 2000, worked together to place the Petitioners on notice that the Respondents were not going to transfer the surplus. Using that logic, the December 21, 1999, LMES plan amendment did not by itself give the Petitioners notice but rather it was the combined effect of the later "Pension Plan Asset Transfer Agreement."

Consequently, there is a huge unanswered question in this case. When the Petitioners learned of the May 24, 2000, agreement or when they even could have learned of the contents of the May 24, 2000, agreement is simply unknown by any party or any court who has reviewed this case. It is common sense that Petitioners could not have learned of the terms of a May 24, 2000, agreement to

which they were not a party, until sometime after May 24, 2000. The combined effect of the panel's decision, as with the reasoning of the lower court, is the utilization of an unfounded presumption that the Petitioners were actually present and in the room when the private agreement between LMES and USEC (the Pension Plan Asset Transfer Agreement) was signed. They were not. In other words, the lower courts' application of law requires magical facts to justify their result. The pension agreement was not a public record which was posted on the Internet. This was not an agreement which was mailed to the Petitioners. This agreement was not even in final form until it was signed, acknowledged, and consented to by the Department of Energy on June 7, 2000.

Only if the Petitioners had a covert insider who conveyed knowledge of this document to them, which then caused them to immediately request a copy under the terms of the Freedom of Information Act, could they have learned of the terms of the Pension Plan Asset Transfer Agreement at the earliest by late July or August of 2000. Because the Petitioners filed their Complaint on June 29, 2004, the Court must determine whether the Petitioners failed to use diligent efforts to discover their potential injury during a twenty-two (22) day window after the terms of the private agreement were finally executed by the Department of Energy on June 7, 2000.

Had the Petitioners magically known of the terms of the June 7, 2000, agreement on June 7, 2000, it would have taken time for them to get a copy of the agreement and employ a professional who could put the contents of the agreement together with the previous plan amendments to determine that the Respondents had made a decision to not transfer the surplus fund. If one agrees

that expecting the Respondents to immediately know the contents of an agreement to which they are not a party is an unreasonable standard, then this case should be remanded.

With all due respect, the combined effect of the panel's Opinion is not the implementation of the common-sense approach in determining what events should have alerted a typical lay person to protect his or her rights. Rather it is the utilization of a fiction that the Petitioners were standing in the room when the Pension Plan Asset Transfer Agreement was signed. Petitioners could not have possibly learned of the contents of the Pension Plan Asset Transfer Agreement before June 29, 2000 because the agreement was never published nor sent to the Petitioners. It was not even in a final executed state until after June 7, 2000. The Petitioners certainly did not know of such facts on May 24, 2000. The fact that a majority of the lower court is of the opinion that the statute of limitation began to run with the passage of the USEC Privatization Act in 1996 (June 7, 2000) is an indication that the court below is misunderstanding the facts of this case.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 05-5788

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ART K. EDWARDS, JAMES H. CHESNUT, VELVA YEOMANS, CHUCK HOBBS, B.J. BOND, TOM EMERSON, HARRY P. COLBERT, C.R. BEVERLY, BILL D. PENRY, TYRONE T. SIVELS, BILL LINDSEY, and CARL W. WALTER, Plaintiffs-Appellants, v. UNITED STATES DEPARTMENT OF ENERGY, LOCKHEED MARTIN ENERGY SYSTEMS, INC., and UNITED STATES ENRICHMENT CORPORATION, Defendants-Appellees.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY (Filed Aug. 11, 2006)

BEFORE: BATCHELDER and GRIFFIN, Circuit Judges; and ZATKOFF, District Judge.*

GRIFFIN, Circuit Judge.

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* The Honorable Lawrence P. Zatkoff, United States District Judge for the Eastern District of Michigan, sitting by designation.

Plaintiffs Art K. Edwards, James H. Chesnut, Velva Yeomans, Chuck Hobbs, B.J. Bond, Tom Emerson, Harry P. Colbert, C.R. Beverly, Bill D. Penry, Tyrone T. Sivels, Bill Lindsey, and Carl W. Walter (collectively hereinafter "Edwards") appeal the district court's dismissal of their claims against defendants United States Department of Energy ("DOE"), Lockheed Martin Energy Systems, Inc. ("LMES"), and United States Enrichment Corporation ("USEC"). Edwards contends that the district court erred in (1) finding that the doctrine of sovereign immunity precluded their claims against DOE, and (2) holding that the federal "catch-all" statute of limitations barred the balance of their claims against LMES and DOE. For the following reasons, we affirm the district court's judgment.

I.

A. *Background.*

Plaintiffs are a class of retirees from the Paducah Gas Diffusion Plant ("PGDP") who were "participants" in the pension plans created for PGDP employees. The PGDP is an 1,800 employee uranium enrichment facility built by the federal government in the early 1950s and, for some time, was operated by various private contractors on behalf of DOE, including Lockheed Martin Utilities Services. *Rainer v. Union Carbide Corp.*, 402 F.3d 608, 611 (6th Cir.), *cert. denied*, ___ U.S. ___, 126 S. Ct. 562 (2005). In part, because of its management by a government agency,[1] S. REP. NO. 104-173, at § 18 (1995), the United

[1] As the government notes, one consequence of PGDP being managed by a government agency was, for example, the requirement that DOE publish certain commercially sensitive materials in the Federal Register. A private company, however, would have treated such

(Continued on following page)

States' uranium enrichment program began to suffer and, as a result, Congress created USEC, a government corporation, as part of the Energy Policy Act of 1992, H.R. 776, 102nd Cong. § 901 (1992) (enacted). Although the statute established USEC as a governmental entity, *id.* §§ 1301(b) & (c), it simultaneously set forth a strategic plan for privatization, *id.* § 1501. While USEC remained a "wholly owned Government corporation," *id.* § 1301(b), it employed private contractors to operate enrichment plans, including PGDP, *Rainer,* 402 F.3d at 611.

Although the Energy Policy Act optimistically called for privatization within two years of its enactment, H.R. 776, § 1501(a), potential investors were skeptical because it remained unclear what liabilities a potential buyer would be asked to assume, S. REP. NO. 104-173, at § 18 (1995). Accordingly, Congress enacted the USEC Privatization Act in 1996 (hereinafter "the Act") to clarify the manner and means by which USEC would be privatized. Omnibus Consolidated Recessions & Appropriations Act of 1996, H.R. 3019, 104th Cong. §§ 3107-17 (1996). In doing so, the Act ordered the directors to "establish a private for-profit corporation under the laws of a State for the purpose of receiving the assets and obligations of the Corporation at privatization and continuing the business operations of the Corporation following privatization." 42 U.S.C. § 2297h-3(a)(1). The private corporation would thereafter be responsible solely for "any liabilities arising out of its operations after the privatization date." *Id.* § 2297h-7(c). The Act makes clear that the private corporation "shall not be an agency, instrumentality, or establishment of the

---

information as proprietary and, as a result, would not have been required to issue it for publication. S. REP. NO. 104-173, at § 18 (1995).

United States, a Government corporation, or a Government-controlled corporation." *Id.* § 2297h-3(b)(1). Correspondingly, the Act expressly withdrew the United States' consent to suit on any claim related to the privatization of USEC. *Id.* § 2297h-7(a)(4).

Pursuant to the foregoing, the privatization process was completed on July 28, 1998, thereby creating the private corporation known as USEC. United States Enrichment Corporation, 63 Fed. Reg. 42,201 (Aug. 7, 1998) (codified at 10 C.F.R. pt. 1101). Assuming that the newly formed USEC elected to terminate or change the contractor for current/retired employee pension plans, the Act required USEC to "arrange for the transfer of all plan assets and liabilities relating to accrued pension benefits of such plan's participants and beneficiaries from such plant to a pension plan sponsored by the new contractor. . . ." 42 U.S.C. § 2297h-8(a)(2).

At the time of privatization, Lockheed Martin Utility Systems, Inc. ("LMUS") served as the operating contractor of PGDP, and LMUS employees participated in a pension plan maintained by defendant LMES. In May 1999, although USEC terminated LMUS as operating contractor of PGDP, roughly 4,000 LMUS employees remained at PGDP and simply became employees of USEC. In accordance with the Act, USEC then effectuated the transfer of more than $548 million worth of pension assets via agreement between LMES and USEC on May 24, 2000 ("the new plan"). At the time of the agreement, a surplus of funds existed in the LMES pension plan beyond the sum necessary to cover the vested benefits of plan participants. Significantly, only PGDP workers were affected by the pension asset transfer agreement between LMES and USEC; employees and retirees from enrichment plans

other than PGDP continued to be covered under the previous pension plan ("the old plan").

Four years later, the sponsor of the old plan increased pension benefits for remaining plan participants, including employees of other enrichment plants. That same year, the USEC pension plan denied an increase in benefits to PGDP employees and retirees.

B. *The instant action.*

Plaintiffs in this case are a putative class comprised of PGDP retirees who, prior to the pension asset transfer, were participants in the LMES-administered pension plan. Consistent with the above, plaintiffs became participants in the USEC plan after the completion of the asset transfer. Apparently dissatisfied with their pension benefits, plaintiffs commenced this action on June 29, 2004, against LMES, USEC, and DOE, alleging violations of the Privatization Act and the breach of various fiduciary duties under the Employee Retirement Income Security Act ("ERISA").[2] The totality of plaintiffs' claims arise from their central contention that defendants failed to transfer a pro rata share of the surplus associated with the LMES pension plan into the USEC plan.

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[2] Specifically, plaintiffs asserted four counts against each of the three defendants. First, plaintiffs claimed that defendants deprived them of equal protection pursuant to the Fourteenth Amendment because plaintiffs were arbitrarily burdened by the award of an increase in benefits exclusively to participants in the old plan. Second, plaintiffs asserted that defendants violated the terms of the Privatization Act. Third, plaintiffs alleged that defendants breached fiduciary duties imposed on them by ERISA. Finally, plaintiffs asserted civil-rights claims pursuant to 42 U.S.C. § 1983.

Both DOE and LMES subsequently moved to dismiss the complaint or, alternatively, to grant summary judgment. Similarly, USEC moved the court to grant a judgment on the pleadings or, in the alternative, to grant summary judgment. On April 13, 2005, the district court dismissed plaintiffs' claims. *Edwards v. United States Dep't of Energy,* 371 F. Supp. 2d 859 (W.D. Ky. 2005). First, the court concluded that the sovereign immunity doctrine precluded plaintiffs' claims against DOE. Second, the court likewise dismissed plaintiffs' claims against LMES and USEC, concluding that (1) plaintiffs' § 1983 claims must fail because neither LMES nor USEC is a "state actor," and (2) plaintiffs' Privatization Act and ERISA claims were time-barred.

In concluding that plaintiffs' Privatization Act claims were time-barred, the district court applied 28 U.S.C. § 1658, the federal "catch-all" four-year statute of limitations that governs statutory remedies created after December 1, 1990. Applying that tolling period, the district court found that plaintiffs either knew or had reason to know of their injury on May 24, 2000, the date of the Pension Plan Transfer Agreement. Although plaintiffs claimed that the statute of limitations did not begin to run until June 30, 2004, designated the "final transfer date" by the terms of the Pension Plan Asset Transfer Agreement, the district court disagreed and stated as follows:

> Plaintiffs' contention that their claim accrued on June 30, 2000 is not consistent with Sixth Circuit case law which focuses on the date of an event which should have alerted the typical lay person to protect his or her rights. *See e.g., Roberson v. Tennessee,* 399 F.3d 792, 2005 WL 350946 (6th Cir.2005). The Plaintiffs' decision to wait until the date of the final installment prior to filing

> suit is identical to the decision of the medical student in *Roberson,* who decided to wait out the appeals process rather than filing a civil rights suit at the point at which a reasonable person would have acted to protect his or her rights. *Id.* at *2, *4.

This timely appeal followed.

II.

We conduct a de novo review of a district court's decision to grant motions seeking either dismissal, summary judgment, *Mich. Paytel Joint Venture v. City of Detroit,* 287 F.3d 527, 533 (6th Cir. 2002), or judgment on the pleadings, *Penny/Ohlmann/Nieman, Inc. v. Miami Valley Pension Corp.,* 399 F.3d 692, 697 (6th Cir. 2005). Summary judgment is appropriate when there are no issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). A complaint is properly dismissed for failure to state a claim when "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984). Although we must view the complaint in the light most favorable to plaintiffs and accept well-pled facts as true, we need not accept legal conclusions as true. *Morgan v. Church's Fried Chicken,* 829 F.2d 10, 12 (6th Cir. 1987). Thus, pure questions of law are subject to de novo review. *S.J. v. Hamilton County,* 374 F.3d 416, 418 (6th Cir. 2004) ("[This Court] review[s] de novo the legal question of whether [a litigant] is entitled to sovereign immunity, but accept[s] any pertinent factual findings by the district court unless they are clearly erroneous." (citations omitted)).

III.

Plaintiffs first contend that the district court incorrectly concluded that the federal "catch-all" statute of limitations operates to bar their Privatization Act claims against LMES and USEC. Specifically, plaintiffs renew their argument that the statute of limitations did not begin to run prior to June 30, 2000, and, additionally, "[t]here is simply nothing in the record as to when the Appellants learned of the contents of the 'Pension Asset Transfer Agreement' or even its existence." Even if they possessed the Agreement, plaintiffs assert that "[t]o conclude that the Appellants claim began accruing on the date of a pro[f]essionally written private agreement with technical references to which the Appellants were not a party is unfair and not consistent with the law as has been applied in this Court." Indeed, plaintiffs state, the focus should be on whether plaintiffs received notice of the pension asset transfer in layman's terms; i.e., notice stating affirmatively and unambiguously that the surplus fund would not be transferred in the transfer agreement. Given that they did not receive such notice, plaintiffs conclude that reversing the district court's grant of summary judgment against LMES and USEC is appropriate.

At the outset, a question exists as to what statute provides the applicable limitations period. The district court accurately observed that the employee protection provisions of the Privatization Act do not include a statute of limitations. *See* 42 U.S.C. § 2297h-8. Noting the absence of a specific limitations period in the Privatization Act, the district court applied the so-called "catch-all" provision found in 28 U.S.C. § 1658. In pertinent part, that statute provides:

> Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section [enacted Dec. 1, 1990] may not be commenced later than 4 years after the cause of action accrues.

28 U.S.C. § 1658(a). As the Supreme Court observed, "[a] cause of action 'aris[es] under an Act of Congress enacted' after December 1, 1990 – and therefore is governed by § 1658's 4-year statute of limitations – if the plaintiff's claim against the defendant was made possible by a post-1990 enactment." *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 382 (2004). Given that the Privatization Act was enacted in 1996, and therefore after 1990, the district court properly applied § 1658.

The question therefore becomes whether plaintiffs commenced the instant action within the applicable four-year statute of limitations. A statute of limitations begins to run "when the plaintiff knows or has reason to know of the injury which is the basis of his action. A plaintiff has reason to know of his injury when he should have discovered it through the exercise of reasonable diligence." *Sevier v. Turner,* 742 F.2d 262, 273 (6th Cir. 1984). "Courts have taken a common-sense approach to this task, inquiring as 'to what event should have alerted the typical lay person to protect his or her rights.'" *Roberson v. Tennessee,* 399 F.3d 792, 794 (6th Cir. 2005) (quoting *Hughes v. Vanderbilt Univ.,* 215 F.3d 543, 548 (6th Cir. 2000)).

In this case, USEC argues, and the district court agreed, that plaintiffs had notice of the Privatization Act claims as early as April 26, 1999, when Congress enacted the Act. Specifically, USEC relies on the language of the Act warning of the "transfer of all plan assets and

liabilities related to accrued pension benefits." 42 U.S.C. § 2297h-8(a)(2). Highlighting the plain language of the Act is indeed appropriate; it does not provide for a transfer of surplus assets from the original plan to the new plan. Alongside this argument, plaintiffs confusingly concede that "[a]ll parties had constructive and actual notice of the USEC Privatization Act and its legislative history which created the impression and obligation that LMES would be transferring 'any surplus funds' with the transfer of the Appellants to the USEC Pension Fund."

Assuming that the Act itself failed to provide the requisite notice, USEC highlights a written notice sent to plaintiffs on May 12, 1999, indicating that LMUS would no longer exist and PGDP employees would become employees of USEC on May 18, 1999. The notice likewise noted that, as a result of that transition, "USEC will provide your pension plan benefits." The notice further explained varied points about the forthcoming transition and invited employees to ask questions by calling a provided phone number or, alternatively, attending information sessions "for those retirees who would like local HR representatives to address questions or concerns in a face-to-face setting." Plaintiffs could undoubtedly have asked questions via phone or at an information session and then subsequently filed a complaint if they learned that the so-called "surplus assets" would not be transferred to their new pension plan.

Even assuming the foregoing was insufficient to provide plaintiffs with notice of their possible cause of action, USEC highlights a plan amendment effective as of

May 18, 1999.[3] A pertinent portion of the transfer amendment labeled "Transfer to the United States Enrichment Corporation Defined Benefit Plan" provides as follows:

> At the direction of the Committee and upon the assumption of such accrued benefit liabilities by the USEC Plan, the Insurance Company and/or Trustee shall transfer to the funding vehicle established for the USEC Plan, assets in cash or in kind equal in value to the then Accrued Benefit of each transferred LMUS Participant. . . . Except as provided herein, or in the Pension Transfer Agreement between USEC and the Company, or at the direction of the United States Department of Energy, *no other assets or liabilities shall be transferred to the USEC Plan from the [old] Plan.*[4]

(Emphasis added.) Finally, the district court highlighted the May 24, 2000, Pension Plan Asset Transfer Agreement itself, which formalized the agreement between USEC and

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[3] USEC suggests that the Amendment became effective on December 21, 1999. That date is, however, the date the Amendment was signed. The Amendment itself reflects that it "shall be effective as of the dates set forth herein." The specific provision governing "Transfer" states that it "is hereby amended effective as of May 18, 1999[.]"

[4] Plaintiffs thematically suggest that language like that contained in the May 18 transfer amendment is beyond the purview of "laymen." Plaintiffs likewise suggest that there is no evidence in the record to indicate that they were provided with this language. Perhaps if this were the sole ground upon which the district court ruled, plaintiffs' arguments would be well-taken. Reference to the May 18 transfer amendment, however, is hardly the sole opportunity plaintiffs had to learn about the pension asset transfer agreement. Instead, the amendment merely provides further evidence that, following a reasonably diligent investigation, plaintiffs could have inquired into whether the "surplus assets" would be transferred to the new plan.

LMES to commence an initial asset transfer of approximately $400 million on or about July 1, 1999.

Taken together, the foregoing events undoubtedly provided plaintiffs with the requisite notice necessary to discover the existence of their cause of action through the exercise of reasonable diligence. As the district court aptly noted, "[i]t should have been clear to the Plaintiffs that they may have had a possible cause of action long before but in any event no later than May 24, 2000, the date of the Pension Plan Agreement." Accordingly, plaintiffs' June 29, 2004, complaint was untimely filed.

IV.

Plaintiffs next renew their contention that the sovereign immunity doctrine does not preclude their claims against DOE. Plaintiffs specifically argue that the language of 42 U.S.C. § 2297h-8(a)(7)(C) provides them with a cause of action.[5]

The United States is protected from suit by sovereign immunity absent a waiver, *Fed. Deposit Ins. Corp. v. Meyer,* 510 U.S. 471, 475 (1994), *and* "a claim falling within the terms of the waiver," *United States v. White Mountain Apache Tribe,* 537 U.S. 465, 472 (2003) (citations

[5] As noted above, plaintiffs mention that a waiver of sovereign immunity applies because "DOE is a required party to enforce the provisions of the USEC Privatization Act." To the extent that this sentence renews their argument below that FED. R. CIV. P. 19(b) applies to this case and renders the United States an "indispensable party," it, too, fails. *California v. Arizona,* 440 U.S. 59 (1979) (concluding that if the United States is an indispensable party pursuant to Rule 19, but that it has not waived sovereign immunity, then "[t]he suit . . . could not be maintained in any court").

omitted). Significantly, the requisite waiver "cannot be implied but must be unequivocally expressed." *United States v. King,* 395 U.S. 1, 4 (1969) (citing *United States v. Sherwood,* 312 U.S. 584 (1941)). Moreover, even in the presence of a valid waiver, the " 'limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied.' " *Lehman v. Nakshian,* 453 U.S. 156, 161 (1981) (quoting *Soriano v. United States,* 352 U.S. 270, 276 (1957)).

In this case, plaintiffs renew their contention that 42 U.S.C. § 2297h-8(a)(7)(C) provides an express waiver of sovereign immunity:

> Any suit alleging a violation of any provision of this subsection, to the extent it does not allege a violation of the National Labor Relations Act, may be brought in any district court of the United States having jurisdiction over the parties, without regard to the amount in controversy or the citizenship of the parties.

Id.

The question therefore becomes whether § 2297h-8's statutory grant of subject-matter jurisdiction likewise qualifies as a waiver of sovereign immunity. As the district court observed, and the government argues, the mere fact that a federal court has jurisdiction to entertain a cause of action does not correspondingly mean that the United States has waived its immunity from being sued on that same cause of action. *United States v. Nordic Village, Inc.,* 503 U.S. 30, 37-38 (1992); *see, e.g., Blatchford v. Native Village of Noatak,* 501 U.S. 775, 786 n.4 (1991) ("The fact that Congress grants *jurisdiction* to hear a claim does not

suffice to show Congress has abrogated all *defenses* to that claim."); *United States v. Certain Land Situated in the City of Detroit,* 361 F.3d 305, 307 (6th Cir. 2004) (concluding 28 U.S.C. § 1367(a), the supplemental-jurisdiction statute, "does not constitute a waiver of sovereign immunity"), *cert. denied,* 543 U.S. 1120 (2005); *Reed v. Reno,* 146 F.3d 392, 398 (6th Cir. 1998) ("Section 1331's general grant of federal question jurisdiction, however, does not by its own terms waive sovereign immunity and vest in district courts plenary jurisdiction over claims for money judgments against the United States.") (internal citation and quotation marks omitted).

More importantly, upon its enactment, the Privatization Act expressly withdrew the government's consent to be sued:

> Any stated or implied consent for the United States, or any agent or officer of the United States, to be sued by any person for any legal, equitable, or other relief with respect to any claim arising from any action taken by any agent or officer of the United States in connection with the privatization of the Corporation is hereby withdrawn.

42 U.S.C. § 2297h-7(a)(4). As the Supreme Court has observed, "the power to withdraw the privilege of suing the United States or its instrumentalities knows no limitations." *Maricopa County v. Valley Nat'l Bank,* 318 U.S. 357, 362 (1943) (citing *Lynch v. United States,* 292 U.S. 571, 581 (1934) (noting "Congress retained power to withdraw the consent at any time" and "consent to sue the United States is a privilege")). The district court therefore correctly concluded that DOE has not waived its sovereign

immunity and, as a result, plaintiffs' action against DOE cannot be maintained.

Affirmed.

ALICE M. BATCHELDER, Circuit Judge. I concur in the result and most of the reasoning of the majority opinion but write separately to express my view that passage by Congress of the Privatization Act in 1996 could not have given the plaintiffs reason to know of a claim arising from a transfer that occurred over four years later on May 24, 2000. In addition, the May 12, 1999, letter from LMUS to the plaintiffs, although relied upon by the district court, also gave the plaintiffs no reason to know of their claim. Although the letter described the level of benefits under the new plan, it did not describe the transfer of assets, surplus or otherwise. It therefore could not have alerted the plaintiffs to the possibility that LMUS would not transfer a portion of the surplus assets to the USEC plan.

I nonetheless agree with the majority and the district court that later events should have alerted the plaintiffs to the need to protect their rights. *See Sevier v. Turner,* 742 F.2d 262, 273 (6th Cir. 1984). The full details of the transfer from the LMUS plan to the USEC plan were described in the LMUS plan amendment of December 21, 1999, and the Pension Plan Transfer Agreement of May 24, 2000. Together, these documents specified that no assets other than "accrued benefits" would be transferred to the new plan and that the transfer would comply with Internal Revenue Code § 414(1), which, among other things, governs disposition of excess assets in the spin-off of a defined benefit plan. *See* 26 U.S.C. § 414(1)(2). These provisions,

when read jointly, should have put the plaintiffs on notice of the need to inquire into the propriety of the transfer described by the plan amendment. Because the plaintiffs could have discovered their claim after May 24, 2000 through the exercise of reasonable diligence, I concur in the result reached by the majority.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

CIVIL ACTION NUMBER: 5:04CV-138-M

ART K. EDWARDS, ET AL. PLAINTIFFS

vs.

DEPARTMENT OF ENERGY, ET AL DEFENDANTS

JUDGMENT

* * * * * * * * * * * * * * * * *

This matter having come before the Court on dispositive motions filed by Defendants, and the Court on this date having issued a Memorandum Opinion and Order granting said motions,

IT IS HEREBY ORDERED that judgment be entered in favor of the Defendants consistent with the Court's Memorandum Opinion and Order and the Plaintiffs' Complaint be dismissed, with prejudice.

THIS IS A FINAL AND APPEALABLE ORDER AND THERE IS NO JUST CAUSE FOR DELAY.

This the 13th day of April, 2005.

JEFFREY A. APPERSON,
CLERK

BY: /s/ Erica A. Skinner
Erica A. Skinner,
Deputy Clerk

Copies to: Counsel of record

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

CIVIL ACTION NO: 5:04CV-138-M

ART K. EDWARDS, *et al.* **PLAINTIFFS**

V.

UNITED STATES OF AMERICA, DEPARTMENT OF ENERGY, LOCKHEED MARTIN ENERGY SYSTEMS, INC., and UNITED STATES ENRICHMENT CORPORATION **DEFENDANTS**

MEMORANDUM OPINION AND ORDER

This matter is before the Court on motions by Defendants, Lockheed Martin Energy Systems, Inc. [DN 14], the United States Department of Energy [DN 15], and the United States Enrichment Corporation [DN 36]. Both the United States Department of Energy and Lockheed Martin Energy Systems move the Court to either dismiss the Complaint of Plaintiffs, Art K. Edwards, et. al, or, in the alternative, to grant summary judgment. The United States Enrichment Corporation moves the Court to grant a judgment on the pleadings, or, in the alternative, to grant summary judgment. Fully briefed, these matters stand ripe for decision. For the following reasons, Defendants' motions are all **GRANTED**.

I. STANDARD OF REVIEW

Upon a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6), the Court must construe the complaint in a light most favorable to the plaintiff, accept all the factual allegations as true, and determine whether

the plaintiff undoubtedly can prove no set of facts in support of its claim that would entitle it to relief. *Sistrunk v. City of Strongsville,* 99 F.3d 194, 197 (6th Cir.1996), *cert. denied,* 520 U.S. 1251 (1997). A judge may not grant a Fed. R. Civ. P. 12(b)(6) motion based on a disbelief of a complaint's factual allegations. *Wright v. MetroHealth Medical Center,* 58 F.3d 1130, 1138 (6th Cir.1995), *cert. denied,* 516 U.S. 1158 (1996). A Fed. R. Civ. P. 12(b)(6) motion tests whether the plaintiff has stated a claim for which the law provides relief. *Gazette v. City of Pontiac,* 41 F.3d 1061, 1064 (6th Cir. 1994).

The standard of review requires that a plaintiff plead more than bare legal conclusions. *Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716, 726 (6th Cir. 1996). The complaint must give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. *Gazette,* 41 F.3d at 1064. "In practice, a . . . complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Lillard,* 76 F.3d at 726 (citation omitted). In deciding a motion to dismiss, the Court may consider all papers and exhibits appended to the complaint, as well as any matters of which judicial notice may be taken. *Hirsch v. Arthur Anderson & Co.,* 72 F.3d 1085, 1092 (2d Cir. 1995).

The Court reviews a motion for judgment on the pleadings pursuant to Rule 12(c) under "the same de novo standard applicable to a motion to dismiss under Rule 12(b)(6)." *Ziegler v. IBP HogMarket, Inc.,* 249 F.3d 509, 511-12 (6th Cir. 2001). "In reviewing the motion, the Court must construe the complaint in the light most favorable to the plaintiff, accept all of the complaint's factual allegations as true, and determine whether the plaintiff undoubtedly

can prove no set of facts in support of his claim that would entitle him to relief." *Id.* at 512. However, the Court "need not accept as true legal conclusions or unwarranted factual inferences." *Mixon v. Ohio,* 193 F.3d 389, 400 (6th Cir. 1999). Judgment in the defendant's favor is warranted if plaintiffs cannot prove any set of facts in support of their claims that would entitle them to relief. *Id.*

In order to grant a motion for summary judgment, the Court must find that the pleadings, together with the depositions, interrogatories, and affidavits, establish that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. The moving party bears the initial burden of specifying the basis for its motion and of identifying that portion of the record which demonstrates the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). Once the moving party satisfies this burden, the non-moving party thereafter must produce specific facts demonstrating a genuine issue of fact for trial. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48 (1986).

Although the Court must review the evidence in the light most favorable to the non-moving party, the non-moving party is required to do more than simply show there is some "metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio* Co., 475 U.S. 574, 586 (1986). The Rule requires the non-moving party to present "specific facts showing there is a genuine issue for trial." Fed. R. Civ. P. 56(e) (emphasis added). "The mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." *Anderson,* 477 U.S. at 252. It

is against these standards that the Court reviews the following facts.

II. BACKGROUND

The Plaintiffs, a class of retirees from the Paducah Gas Diffusion Plant (PGDP), were "participants" in the Pension Plans for employees who worked at PGDP. In this action, Plaintiffs argue that they are not receiving the full retirement due to them under the Pension Plans and bring claims against Lockheed Martin Energy Systems (LMES), the United States Department of Energy (DOE), and the United States Enrichment Corporation (USEC) pursuant to the USEC Privatization Act, 42 U.S.C. § 2297h et seq., the Employee Retirement Income Security Act (ERISA), as amended, 29 U.S.C. § 1001 et seq., the Equal Protection Clause of the U.S. Constitution, and 42 U.S.C. § 1983.

Before 1993, the PGDP was operated by various contractors acting on behalf of the DOE. In 1992, Congress determined that due to a shrinking market share, the domestic uranium enrichment program needed to have "the flexibility of a private sector operation to adequately respond to an intensely competitive international market." Accordingly, Congress created the United States Enrichment Corporation (Enrichment Corporation), a government-owned corporation, to carry out that privatization mission.

On July 1, 1993, all DOE contracts "relate[d] to uranium enrichment and related services" were transferred as a matter of law to the Enrichment Corporation. Private contractors continued to operate the PGDP on behalf of the Enrichment Corporation until it developed its own plan for privatization. On June 30, 1995, the Enrichment

Corporation presented President Clinton and Congress with its plan for privatization. On April 2, 1996, the "USEC Privatization Act," 42 U.S.C. § 2297h, was signed into law. Prior to the implementation of the USEC Privatization Act (Privatization Act), the employees of the various contractors who operated the PGDP were all "plan participants" in a pension plan which was sponsored by the various contractors as well as the DOE. The Privatization Act created a new scheme that is the subject of this litigation.

Pursuant to the Privatization Act, the Government-owned Enrichment Corporation transferred its assets to the publicly traded United States Enrichment Corporation, Inc. (USEC) and became a wholly-owned subsidiary of the USEC. On July 28, 1998 the privatization of the USEC took effect after an initial public offering of 100 percent of the corporation's stock to private investors. Since that date, the USEC has operated the PGDP.

As previously noted, the PGDP has been operated by various contractors over the last 54 years. Despite changes in the operating contractors at the PGDP, the labor and management force of employees remained constant. In other words, any change in the operating contractor preserved the labor and management force of the previous operating contractor and that labor and management force became employees of the new operating contractor. Thus, when Lockheed Martin Utility Systems became the new operating contractor in 1995, the employees at the PGDP continued to be participants in what was then called "The Retirement Program Plan for Employees of Lockheed Martin Energy Systems, Inc."

Once USEC completed privatization, it terminated LMES as the operating contractor of the Paducah plant. That decision triggered one of the "employee protections" provisions in the Privatization Act, 42 U.S.C. § 2297h-8(a)(2), which states as follows:

> In the event the private corporation terminates or changes the contract at either or both of the gaseous diffusion plants, the plan sponsor or other appropriate fiduciary of the pension plan covering employees of the prior operating contractor shall arrange for the transfer of all plan assets and liabilities relating to accrued pension benefits of such plan's participants and beneficiaries from such plant to a pension plan sponsored by the new contractor or the private corporation or a joint labor-management plan, as the case may be.

At the time USEC terminated LMES' contract on May 18, 1999, USEC informed all retirees in the class that Plaintiffs purport to represent that they were going to be transferred from LMES' pension plan (the "original plan") to a pension plan established by USEC (the "new plan").[1] The notice, however, did not state that any surplus assets would be transferred from the original plan to the new plan. On December 21, 1999, the original plan was amended to clearly state that the original plan would transfer assets to the new plan in an amount equal to the accrued benefit of each transferred participant. Then, on

[1] The term "original plan" refers to the plan that was formerly maintained by LMES and that is now maintained by BWXT Y-12 L.L.C., an operating contractor subsequent to LMES that took over the original plan. The term "new plan" refers to the plan covering current USEC employees and retirees.

May 24, 2000, USEC and LMES entered into a Pension Plan Asset Transfer Agreement, thus formalizing an arrangement that began with an initial asset transfer of approximately $400 million on or about July 1, 1999. This Agreement provided that the asset transfer would comply with section 414(I) of the Internal Revenue Code, and the Agreement made no provision whatsoever for the transfer of any surplus. Furthermore, the Agreement designated July 1, 1999 as the "initial transfer date," and June 30, 2000 as the "final transfer date." On June 15, 2000, LMES transferred the remaining balance from the original plan to the new plan.

Dissatisfied with both their transfer into the new plan and LMES' failure to transfer the surplus into the new plan, the Plaintiffs brought this action on June 29, 2004 naming as Defendants, USEC, LMES, and the DOE. Specifically, the Plaintiffs assert four counts against each of the Defendants. First, they aver that Defendants have deprived them of equal protection of the laws under the 14th Amendment in that they have been arbitrarily burdened by the award of an increase in benefits only to participants in the predecessor plan. Second, they contend that the Defendants have violated the express terms of the Privatization Act. Third, Plaintiffs aver that the Defendants have breached their fiduciary duties under ERISA. Fourth, Plaintiffs allege that the Defendants are liable to them under 42 U.S.C. § 1983 as a result of each of the first three purported violations enumerated in the Complaint.

III. DISCUSSION

Defendants LMES, DOE, and USEC argue that all of these claims as set forth by the Plaintiffs cannot survive

their respective motions. The DOE, in addition to arguing the merits of the Plaintiffs' claims, assert the defense of sovereign immunity. The Court will first address the DOE's sovereign immunity argument.[2] Thereafter, the Court will address the Plaintiffs' claims in the following order: (1) the Constitutional claim, (2) the Privatization Act claim, (3) the ERISA claim.

A. Plaintiffs' Claims against the DOE

Although the Plaintiffs raise several legal issues in their claims against the DOE, the Court need not address them all. Resolution of the sovereign immunity question will decide the matter. The DOE contends that, in enacting the Privatization Act, the United States expressly retained its sovereign immunity from any suit seeking to hold it liable for any of its actions in connection with the privatization of USEC, or for any of the operations of USEC after its privatization. The Plaintiffs argue that the Privatization Act contained a waiver of sovereign immunity.

The sovereign immunity doctrine essentially holds that a sovereign cannot he sued without its consent. *Hans v. Louisiana,* 134 U.S. 1, 15-18 (1890). Thus, the Court's subject matter jurisdiction over the United States exists only to the extent that the United States has waived its sovereign immunity. *See Hercules, Inc. v. United States,* 516 U.S. 417, 422-423 (1996). When a question of waiver is at issue, any waiver of sovereign immunity must be strictly construed in favor of the United States since the

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[2] Whether there has been an adequate waiver of sovereign immunity is a threshold issue. *See e.g., Britell v United States.* 372 F.3d 1370, 1376 (Fed. Cir. 2004).

"limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Lehman v. Nakshian,* 453 U.S. 156, 161 (1981).

The Plaintiffs argue that 42 U.S.C. § 2297h-8(a)(7)(c) provides such an express waiver of sovereign immunity:

> Any suit alleging a violation of any provision of this subsection, to the extent it does not allege a violation of the *National Labor Relations Act,* may be brought in any district court of the United States having jurisdiction over the parties, without regard to the amount in controversy or the citizenship of the parties.

However, simply because a district court may have jurisdiction to hear a certain cause of action does not mean that the United States has waived its immunity if that action were to be brought against it. *United States v. Nordic Village, Inc.,* 503 U.S. 30, 37-38 (1992). In other words, the mere fact that Congress has granted jurisdiction to hear a claim does not suffice to show that Congress has abrogated all defenses to that claim. *Id.* at 38.

The Plaintiffs' argument is further unconvincing in light of the express text of the Privatization Act. The Privatization Act expressly withdraws the government's consent to be sued "for any legal, equitable, or other relief with respect to any claim arising from any action taken by any agent or officer of the United States in connection with the privatization" of USEC, Inc. 42 U.S.C. § 2297h-7(a)(4). The Privatization Act also states that the USEC is not an "agency, instrumentality, or establishment of the United States, a Government corporation, or a Government-controlled corporation." 42 U.S.C. § 2297h-3(b)(1).

Finally, the Privatization Act assigns any liability arising out of the operation of USEC, after its privatization date, solely to that corporation, not to the United States. 42 U.S.C. § 2297h-7(c).

The Plaintiffs also assert that the United States was "in charge" of the establishment of the new pension plan, that it is likely that the United States would be an indispensable party to this lawsuit under F.R.C.P. 19(b), and that therefore the United States has waived its immunity from suit. It does not necessarily follow that if the United States is an indispensable party it has waived its immunity. If the sovereign has retained its immunity but is an indispensable party to the lawsuit, the only course of action available to the court would be to dismiss the suit in its entirety, not to mandate the joinder of the sovereign as a defendant. *See California v. Arizona,* 440 U.S. 59, 62 (1979); *Spirit Lake Tribe v. North Dakota,* 262 F.3d 732, 746-47 (8th Cir.2001).

For these reasons, the Court holds that the DOE has not waived its sovereign immunity and its motion to dismiss for failure to state a claim is thus granted.

B. Plaintiffs' Claims against LMES and USEC

Having found the DOE to be immune from suit, the Court now turns its attention to Plaintiffs' claims against LMES and USEC.

1. Constitutional Claim

The Plaintiffs bring an equal protection claim in Count I of the Complaint pursuant to 42 U.S.C. § 1983[3] as set forth in Count IV of the Complaint. Specifically, Plaintiffs contend that as a result of the Defendants' application and administration of the Privatization Act, they have been classified in a manner which has arbitrarily burdened them as a class and has denied them "equal protection" as guaranteed by the 14th Amendment. The issue is the applicability of the 14th Amendment to USEC and LMES. Plaintiffs argue that as USEC was formerly owned by the federal government and LMES contracted with the federal government, an equal protection claim against both is appropriate. In response, LMES contends that a private corporation is not liable for a "constitutional tort" for damages when it contracts with the federal government. USEC argues that as it became a private corporation on July 28, 1998, it likewise cannot be held liable for a "constitutional tort."

Only a state actor can violate the 14th Amendment. *Rendell-Baker v. Kohn,* 457 U.S. 830, 838 (1982). Thus, any 14th Amendment claim brought against a private actor must necessarily fail. However, an action that violates the 14th Amendment guarantee of equal protection when committed by a state actor violates the due process guarantee of the 5th Amendment when committed by a federal actor. *United States v. Elliott,* 89 F.3d 1360,

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[3] 42 U.S.C. § 1983 states in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State . . . subjects or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . shall be liable . . . "

1364 (8th Cir.1996), Thus, if the Plaintiffs can show that either USEC or LMES is a federal actor, they can state a claim under the Due Process Clause of the 5th Amendment. The Court will thus treat the Plaintiffs' equal protection claim under the 14th Amendment as a due process claim under the 5th Amendment.

In *Corr. Servs. Corp. v. Malesko,* 534 U.S. 61, 66 (2001), the Supreme Court refused to recognize a "constitutional tort" for damages, under a *Bivens* theory, against a corporation which contracts with the federal government. *See generally Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388 (1971); *see also Ruff v. Runyon,* 258 F.3d 498, 502 (6th Cir.2001) (stating that § 1983 and *Bivens* actions are identical except for the requirement of a state actor under § 1983 and federal actor under *Bivens*).[4]

In this case, LMES and USEC are both private corporations.[5] The record illustrates that USEC became a private corporation on July 28, 1998. This date was well before any of the incidents which provided the basis for the Plaintiffs' claims, and so Plaintiffs' constitutional claim against USEC fails. Likewise, LMES is not a "federal

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[4] The Plaintiffs brought their equal protection claim under § 1983. The Court found that the Plaintiffs' equal protection claim was actually a due process claim under the 5th Amendment, which is applicable only to the federal government. Thus, Plaintiffs cannot bring an equal protection claim under § 1983. Rather, their claim is more appropriately stated as a due process claim under *Bivens.*

[5] Based on this finding, all of Plaintiffs' claims in Count IV of the Complaint fail.

actor" based on *Malesko*, and Plaintiffs' constitutional claim against it fails as well.[6]

2. Privatization Act

Based on the language of the Privatization Act and its legislative history, Plaintiffs argue that they should not have been transferred from the original plan to the new plan. Alternatively, the Plaintiffs argue that, even if they should have been transferred, their transfer should have been accompanied by a transfer of additional assets reflecting a "surplus" in the original plan. Because neither of the aforementioned events occurred, Plaintiffs contend that LMES and USEC violated the terms of the Privatization Act. Plaintiffs aver that LMES violated the Privatization Act in that they failed to transfer "all plan assets relating to accrued pension benefits." Plaintiffs aver that USEC violated the Privatization Act by not taking affirmative steps to facilitate what Plaintiffs view as a required transfer by law.

LMES extensively addresses the language and the legislative history of the Privatization Act in its brief and argues that the text, when interpreted in light of ERISA, does not support the Plaintiffs' argument.[7]

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[6] The remaining issue presented by Count I is the assertion that the transfer of the retiree benefits was "unauthorized." This issue calls for an examination of the merits of the Plaintiffs' claims under the Privatization Act and ERISA. The Court need not discuss this issue based on its holdings in sections B2 and B3.

[7] LMES further filed a motion in which it argued that the Plaintiffs made erroneous assertions regarding the legislative history of the Privatization Act. As the Court has decided this case on other grounds, it need not assess the accuracy of LMES' contentions.

USEC addresses this issue in its brief but also argues that the Plaintiffs' Privatization Act claim must fail for two additional reasons: (1) the Plaintiffs' claim is time-barred under the federal "catch-all" statute of limitations and (2) the Plaintiffs lack Article III standing. The Court finds that the statute of limitations argument is controlling, and thus it need not address any other issue presented by the parties.[8]

The employee protection provisions of the Privatization Act, which give plaintiffs the right to bring an enforcement action, do not include a specific statute of limitations for bringing such actions. 42 U.S.C. § 2297h-8. The Privatization Act was enacted in 1996. In cases where a federal piece of legislation was enacted on or after December 1, 1990, the applicable statute of limitations is 28 U.S.C. § 1658, the federal "catch-all" statute of limitations, which provides, "except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues."

The Plaintiffs in this action filed their Complaint on June 29, 2004. Neither the Plaintiffs nor any of the Defendants dispute the applicability of 28 U.S.C. § 1658 to the

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[8] Although LMES makes no mention of a defense based on the statute of limitations in its motion, the Plaintiffs' claims against LMES under the Privatization Act and ERISA are, in the Court's view, time-barred by the statutes of limitations as set forth in 28 U.S.C. § 1658 and 29 U.S.C. 1113(2) respectively. Plaintiffs had an opportunity to respond to USEC's statute of limitations argument as to their claims under the Privatization Act and ERISA. Thus, Plaintiffs are not prejudiced by the Court's application of the statute of limitations defense to the claims Plaintiffs asserted against LMES.

instant case, and the Court likewise concludes that it is applicable. Thus, the relevant question becomes at what point did the Plaintiffs' claim under the Privatization Act accrue for purposes of the statute of limitations. If the Plaintiffs' Privatization Act claim accrued before June 29, 2000, then the claim is barred by the federal "catch-all" statute of limitations. If the Plaintiffs' claim accrued after June 29, 2000, then the Plaintiffs' claim is not time barred.

Both parties cite the Pension Plan Asset Transfer Agreement, dated May 24, 2000, as relevant in determining when Plaintiffs' Privatization Act claim accrued. By the terms of the agreement, July 1, 1999 was designated as the "initial transfer date," and June 30, 2000 was designated as the "final transfer date." The Plaintiffs argue that the "final transfer date" marks the time at which its Privatization Act claim began to accrue. USEC contends that the Plaintiffs' claim accrued no later than May 24, 2000, the date of the Pension Plan Asset Transfer Agreement.

A "statute of limitations commences to run when the plaintiff knows or has reason to know of the injury which is the basis of his action." *Sevier v. Turner,* 742 F.2d 262, 273. "A plaintiff has reason to know of his injury when he should have discovered it through the exercise of reasonable diligence. *Id.* In deciding when a statute of limitations should begin to run, courts inquire as "to what event should have alerted the typical lay person to protect his or her rights." *Hughes v. Vanderbilt Univ.,* 215 F.3d 543, 547 (6th Cir.2000).

In the instant case, USEC cites four dates at which point the Plaintiffs should have known to protect their rights:

1. On April 26, 1996, Congress enacted the USEC Privatization Act. The Privatization Act did not provide for a transfer of surplus assets from the original plan to the new plan.

2. In May 1999, all retirees in the class Plaintiffs purport to represent were sent written notices that they – and the assets attributable to their accrued benefit – would be transferred from the original plan to the new plan. The notice further stated that their pensions would be paid from the assets of the new plan. The notice did not state that surplus assets would be transferred from the original plan to the new plan.

3. On December 21, 1999, the original plan was amended to clearly state that the original plan would transfer assets to the new plan in an amount equal to the accrued benefit of each transferred participant.

4. On May 24, 2000, USEC and LMES entered into a Pension Plan Asset Transfer Agreement, thus formalizing an arrangement that began with an initial asset transfer of approximately $400 million on or about July 1, 1999. This Agreement provided that the asset transfer would comply with section 414(I) of the Internal Revenue Code. The Agreement made no provision whatsoever for any transfer of surplus.

It should have been clear to the Plaintiffs that they may have had a possible cause of action long before but in any event no later than May 24, 2000, the date of the Pension Plan Transfer Agreement. As May 24, 2000 reflects that latest possible date at which Plaintiffs should have known that they may have had a cause of action,

Plaintiffs' surplus transfer claim could not have accrued after that date.[9]

Plaintiffs' contention that their claim accrued on June 30, 2000 is not consistent with Sixth Circuit case law which focuses on the date of an event which should have alerted the typical lay person to protect his or her rights. *See e.g, Roberson v. State of Tennessee*, 2005 WL 350946, No. 03-6181 (6th Cir. Feb. 15, 2005). The Plaintiffs' decision to wait until the date of the final installment prior to filing suit is identical to the decision of the medical student in *Roberson,* who decided to wait out the appeals process rather than filing a civil rights suit at the point at which a reasonable person would have acted to protect his or her rights. *Id.* at *2, *4.

3. ERISA

In Count III of the Complaint, the Plaintiffs' set forth a claim under ERISA. That claim is based upon a breach of fiduciary duty. Specifically, the Plaintiffs aver that the Defendants have failed to comply with ERISA transfer requirements, have unlawfully and without authorization transferred the Plaintiffs as "plan participants" from the original plan to the new plan, and have withheld the pro rata share of the surplus fund related to the Plaintiffs' pensions from the new plan. They also argue that USEC is in continuing breach of its fiduciary duty. Defendants LMES and USEC set forth several defenses in response to

[9] On May 18, 1999, Plaintiffs were told that they would be transferred from the original plan to the new plan. Based on that communication alone, Plaintiffs wrongful transfer claim must fail as barred by the federal "catch-all" statute of limitations. Thus, the focus of the Court's inquiry is on the surplus transfer claim.

these claims, but the Court again need only discuss the statute of limitations defense set forth by USEC, as it is controlling.

Under ERISA, when a fiduciary breaches an obligation or duty, the victim of the breach normally has six years in which to file suit. 29 U.S.C. § 1113(1). However, this period may be shortened to three years where the victim had "actual knowledge of the breach or violation." 29 U.S.C. § 1113(2).[10] The appellate courts are conflicted on the proper interpretation of the phrase "actual knowledge." *See Wright v. Heyne,* 349 F.3d 321 (6th Cir.2003). The Sixth Circuit, however, recently settled on the following interpretation of the phrase "actual knowledge:"

> [T]he relevant knowledge required to trigger the statute of limitations under 29 U.S.C. § 1113(2) is knowledge of the facts or transaction that constituted the alleged violation; it is not necessary that the plaintiff also have actual knowledge that the facts establish a cognizable legal claim under ERISA in order to trigger the running of the statute. This view is not only in accord with our

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[10] Section 413 of ERISA, 29 U.S.C. § 1113 states as follows: No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of –

(1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or

(2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;

except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

> previous ERISA "actual knowledge" decisions but it also furthers the policies underlying statutes of limitations. Among the basic policies served by statutes of limitations is preventing plaintiffs from sleeping on their rights and prohibiting the prosecution of stale claims.

Id. at 330.

The Sixth Circuit also rejected an argument that the three-year statute of limitations is tolled until the plaintiff consults with an attorney and learns from the attorney that he has a claim for breach of ERISA fiduciary duties. *Id.* at 331.

Furthermore, courts have rejected the continuing violation theory in an ERISA benefit case arising under § 1113(a)(2) since application of the continuing violation theory would read the "actual knowledge" requirement out of the statute. *See Phillips v. Alaska Hotel and Restaurant Employees Pension Fund,* 944 F.2d 509, 520 (9th Cir. 1991), *cert. denied* 504 U.S. 911 (1992). "Once a plaintiff knew of one breach, an awareness of later breaches would impart nothing materially new." *Id.* at 520.

The three-year statute of limitations as set forth in 29 U.S.C. § 1113(2) is applicable in the instant case as the Plaintiffs do not allege fraud or concealment. The Court's reasoning as to the timing of the accrual of Plaintiffs' claim under the Privatization Act is likewise applicable here. Plaintiffs' claim under ERISA could have accrued no later than May 24, 2000. Thus. Plaintiffs' ERISA claim is barred by the statute of limitations.

IV. CONCLUSION

For the reasons set fort [sic] above, the motions of Defendants LMES [DN 14], DOE [DN 15], and USEC [DN 36] are all **GRANTED**.

[SEAL]

/s/ Joseph H. McKinley, Jr.
Joseph H. McKinley, Jr., Judge
United States District Court

April 11, 2005

cc: counsel of record
04-138Edwards

No. 05-5788

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ART K. EDWARDS, ET AL. Plaintiffs-Appellants, v. UNITED STATES DEPARTMENT OF ENERGY, ET AL., Defendants-Appellees.	)	ORDER (Filed Oct. 31, 2006)

BEFORE: BATCHELDER and GRIFFIN, Circuit Judges; and ZATKOFF,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original

* Hon. Lawrence P. Zatkoff, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk [Illegible]

EXHIBIT 4

PENSION PLAN ASSET TRANSFER AGREEMENT

THIS AGREEMENT (this "Agreement") dated as of May 24, 2000, by and among United States Enrichment Corporation, a Delaware corporation ("USEC") and Lockheed Martin Energy Systems, Inc., a Delaware corporation ("LMES").

WHEREAS, effective as of May 18, 1999 (the "Transition Date"), USEC has terminated the Operation and Maintenance Contract between USEC and Lockheed Martin Utility Services, Inc. ("LMUS"), dated as of October 1, 1995; and

WHEREAS, in accordance with the applicable provisions of the privatization legislation (42 USC 2297h-8(a)(2)) (the "Privatization Legislation"), in the event of such termination, the plan sponsor of the Retirement Program Plan for Employees of Martin Marietta Energy Systems, Inc. (the "LMES Plan") shall cause certain assets and liabilities of the LMES Plan to be transferred to a pension plan adopted or maintained by USEC for this purpose (the "USEC Plan"); and

WHEREAS, the parties hereto desire to provide for the transfer of certain assets and liabilities from the LMES Plan to the USEC Plan on behalf of certain employees and retirees of LMUS and certain predecessors to LMUS, as more fully set forth herein;

NOW, THEREFORE, in consideration of the foregoing and the premises and mutual covenants and agreements herein contained, the parties hereto agree as follows:

1. Transfer of Assets and Accrued Benefit Liabilities.

(a) Effective as of the Transition Date, USEC shall cause (i) any active employee of LMUS immediately prior to the Transition Date who is participating in the LMES Plan, and (ii) any former employee of LMUS or any predecessor thereto who (A) is entitled to current or future benefits under the LMES Plan and (B) was employed at the gaseous diffusion plant at Paducah, Kentucky or Piketon, Ohio immediately prior to such employee's termination of employment (each, a "Transferred Participant," and collectively, the "Transferred Participants") to be covered under the USEC Plan. USEC shall cause the USEC Plan to be qualified under section 401(a) of the Internal Revenue Code of 1986, as amended (the "Code"), and the related trust to be exempt from taxation under section 501(a) of the Code. The USEC Plan shall credit each Transferred Participant who becomes a participant in the USEC Plan as of the Transition Date with all service credited to such Transferred Participant prior to the Transition Date under the LMES Plan, for all purposes required to be credited pursuant to applicable law. Effective as of the Initial Transfer Date (as defined below), the liability for each Transferred Participant's accrued benefit under the LMES Plan as of the Transition Date shall be transferred to and assumed by the USEC Plan, as herein described.

As promptly as practicable, USEC shall provide LMES with a copy of the USEC Plan and executed trust agreement between USEC and a trustee (or trustees) designated by it. Upon USEC's receipt of a favorable determination letter from the Internal Revenue Service (the "IRS") regarding the tax qualification of the USEC

Plan, USEC shall promptly provide LMES with a copy of such letter.

LMES has provided USEC or (USEC's counsel) with (i) a copy of the most recent favorable determination letter from the IRS regarding the tax qualification of the LMES Plan and (ii) a copy of the LMES Plan and executed trust agreement between LMES and the trustee of the LMES Plan. Upon LMES' receipt of a subsequent favorable determination letter from the IRS regarding the tax qualification of the LMES Plan, LMES shall promptly provide USEC with a copy of such letter. In addition, LMES hereby represents that the provisions of any applicable collective bargaining agreements are consistent with the terms of the LMES Plan.

(b) On or about July 1, 1999 (the "Initial Transfer Date"), LMES caused the trustee of the trust under the LMES Plan to transfer to the trustee of the trust under the USEC Plan, in cash and in kind, an amount equal to approximately four hundred million dollars ($400,000,000) (the "Initial Transfer Amount"). The remaining amount to be transferred pursuant to this Agreement (the "Residual Amount") shall be transferred as promptly as practicable after the calculations relating to such transfer have been completed (which LMES and USEC shall use all reasonable efforts to accomplish as promptly as practicable), but in no event later than June 30, 2000, unless the parties agree to an extension (the "Final Transfer Date"). Also on the Final Transfer Date, LMES shall cause the trustee of the trust under the LMES Plan to transfer to the trustee of the trust under the USEC Plan an additional amount (in cash or in kind, to the extent reasonably and mutually acceptable to USEC and LMES) representing the actual earnings or losses on (i) the Initial Transfer Amount from

May 31, 1999 to the Initial Transfer Date (the "Initial Transfer Amount Earnings"), (ii) the Initial Transfer Amount Earnings from the Initial Transfer Date to the Final Transfer Date, and (iii) the Residual Amount from May 31, 1999 to the Final Transfer Date.

The parties hereto shall cooperate in the filing of any required forms or applications, and in taking all other actions that are necessary or appropriate relating to the IRS, the Pension Benefit Guaranty Corporation, the U.S. Department of Labor, and any other regulatory agency that has jurisdiction over such transfers, to consummate the transfers contemplated by this Agreement within the time periods contemplated by this Agreement.

(c) The Initial Transfer Amount and the Residual Transfer Amount (together, the "Transfer Amount") shall be calculated based on such actuarial assumptions as are determined and agreed to by an actuary retained by LMES ("LMES' Actuary") and an actuary retained by USEC ("USEC's Actuary," and together with LMES' Actuary, the "Actuaries"), and which are set forth on Schedule A attached hereto. In addition, the transfer and all other related transactions contemplated by this Agreement shall be made in accordance with the terms of the proposal set forth by the United States Department of Energy (the "DOE") by letter to USEC dated May 5, 1999, and the acceptance and modification to such proposal by USEC by letter to the DOE dated June 21, 1999, as accepted by DOE by letter to USEC dated July 30, 1999.

(d) Notwithstanding the foregoing, all transfers of assets and liabilities hereunder shall comply with section 414(l) of the Code. In the event that the Transfer Amount is less than the amount that is required to be transferred

pursuant to section 414(l) of the Code (the "414(l) Transfer Amount"), then LMES shall promptly cause the trustee of the trust under the LMES Plan to transfer to the trustee of the trust under the USEC Plan, in cash, or in kind, to the extent reasonably and mutually acceptable to USEC and LMES, an amount to the 414(l) Transfer Amount minus the Transfer Amount.

(e) Qualified domestic relations orders ("QDROs") that relate to Transferred Participants under the LMES Plan, and that have either been previously approved by the LMES Plan administrator or that are currently awaiting approval, shall be transferred to the USEC Plan effective as of the Transition Date. LMES shall provide USEC with a list of such QDROs on, or as soon as practicable following, the Transition Date together with complete files on such QDROs. LMES hereby represents that the QDROs that have been approved by LMES satisfy the requirements of section 414(p) of the Code.

(f) The assets of both the LMES Plan and USEC Plan include group annuity contracts (each, a "GAC" and collectively, the "GACs") issued by the Prudential Insurance Company of American and the Metropolitan Life Insurance Company (each, an "Insurance Company and collectively, the "Insurance Companies"). The USEC Plan GACs were funded initially with assets transferred from the LMES Plan GACs. In the event that a demutualization or comparable transaction occurs with respect to an Insurance Company and in connection therewith consideration is paid to the LMES Plan with respect to a GAC issued by or on behalf of such Insurance Company, the LMES Plan shall be entitled to the entire amount of such consideration; provided, however, that (i) if the amount of the consideration paid to the LMES plan was determined

on the basis of how long the GAC assets were held by policyholders and/or (ii) if the longevity factor used by the Insurance Companies took into account periods on or prior to July 1, 1999, then the LMES Plan shall transfer to the USEC Plan consideration received from the Insurance Company in respect of such transferred GAC assets as determined under this subparagraph (f). If consideration is owed the USEC plan by the LMES Plan in accordance with this subparagraph (f), the amount of such consideration shall be determined by multiplying the total amount of consideration received by the LMES Plan from the Insurance company in connection with the demutualization or comparable transaction by a fraction, the numerator of which is the dollar amount of LMES Plan GAC liabilities transferred to the USEC Plan GAC that were included in the Insurance Company's determination of the consideration paid to the LMES plan, and the denominator of which is the total dollar amount of GAC liabilities that were used by the Insurance Company to determine the amount of consideration that was paid to the LMES Plan. LMES shall cause the trustee of the LMES plan or the Insurance Company to pay any consideration owed to the USEC Plan as soon as practicable following the date the LMES Plan or LMES Plan GAC receives such consideration from the Insurance Company.

Notwithstanding the foregoing, consideration with respect to the demutualization or comparable transaction of the Insurance Companies shall not be owed the USEC Plan by the LMES Plan with respect to assets transferred from the LMES Plan GAC to the USEC Plan GAC to the extent consideration is paid with respect to such demutualization or comparable transaction by the Insurance Companies to the USEC Plan with respect to such assets.

g. If a Transferred Participants: (i) returns to employment with LMES or an employer which at that time is an adopting employer of the LMES Plan (or any successor plan to the LMES Plan), and (ii) USEC and LMES or such other employer, as the case may be, agree that the accrued benefit of such Transferred Participant in the USEC Plan will be transferred from the USEC Plan to the LMES Plan (or any successor plan to the LMES Plan), then, unless otherwise agreed to by USEC and LMES or such other employer, USEC agrees to direct the trustee of the USEC Plan to transfer an amount to the LMES Plan (or such successor plan) equal to such transferred liabilities, determined using the assumptions then used by the Pension Benefit Guaranty Corporation (or any successor thereto) for determining benefit liabilities upon plan termination.

2. Indemnifications and Representations.

(a) LMES shall indemnify and hold USEC, its officers, directors, employees, agents and affiliates harmless from and against any and all costs, damages, losses, expenses or other liabilities (collectively, the "Liabilities") arising from or related to a breach of the representations provided by LMES in this Agreement, or by LMES or DOE in any other communications by LMES or DOE (including their respective counsel), including the letter from King & Spalding to USEC dated May 19, 1999, regarding the LMES Plan, and USEC shall indemnify and hold LMES, its officers, directors, employees, agents and affiliates harmless from and against any and all Liabilities arising from or related to a breach of the representations provided by USEC in this Agreement, or in any other communications by USEC (including its counsel), including the letter

from Skadden, Arps, Slate, Meagher & Flom LLP to LMES dated May 20, 1999, regarding the USEC Plan.

(b) LMES represents that the LMES Plan is qualified under section 401(a) of the Code and the LMES Plan trust is exempt from taxation under section 501(a) of the Code. In addition, LMES represents that the accrued benefit of each Transferred Participant that is being assumed by the USEC Plan has been calculated in accordance with the terms of the LMES Plan and any applicable collective bargaining agreement, and that the list of all Transferred Participants who terminated employment prior to the Transition Date and are entitled to benefits under the LMES Plan as of the Transition Date ("Retirees"), furnished to USEC Pursuant to Section 3 constitutes all Retirees. To the extent the accrued benefit of a Transferred Participant has been calculated incorrectly or a Retiree has been omitted from the list of Transferred Participants, LMES and DOE agree to transfer additional assets from the LMES Plan to the USEC Plan to correct such calculation or omission using the actuarial assumptions reasonably and mutually agreed upon by the Actuaries to calculate the remaining accrued benefit of such Transferred Participant or omitted Retiree. The USEC Plan shall thereafter assume the liability to pay the correct amount of the accrued benefit of such Transferred Participant or Retiree and the LMES Plan shall be relieved of the liability to pay for any such Retiree. If the accrued benefit of a Transferred Participant was calculated incorrectly or a Retiree was included in the list of Transferred Participants in error, resulting in excess assets being transferred from the LMES Plan to the USEC Plan, USEC agrees, to the extent permitted by applicable law, to transfer from the USEC Plan to the LMES Plan

assets sufficient to correct such error (less any liabilities incurred by the USEC Plan with respect to such incorrect payment or additional Retiree), using the actuarial assumptions reasonably and mutually agreed upon by the Actuaries. In the case of the erroneous transfer of a Retiree, the LMES plan shall thereafter assume the liability to pay the accrued benefit of such Retiree, and the USEC Plan shall be relieved thereof.

3. Furnishing and Auditing Data; Cooperation.

As soon as practicable following the date hereof, LMES shall provide to USEC a schedule containing the accrued liabilities, as of May 31, 1999 (the "Accrued Liabilities"), for each Transferred Participant, shall identify each Transferred Participant that is a Retiree, and shall provide such additional current census data, plan documents and other pertinent information that USEC may reasonably require to reasonably audit the calculations prepared by LMES' Actuary. In the event the USEC Actuary or LMES' Actuary find any material discrepancies in the information or calculations provided by LMES' Actuary, the Actuaries shall attempt to resolve such discrepancies. In the event that such attempt is unsuccessful, then the Actuaries shall notify the parties hereto of their failure to reach a resolution, and such discrepancies shall be resolved by a third actuary, retained by the actuaries. The expenses of the third actuary shall be shared equally by the parties hereto, and its resolution of such discrepancies shall be binding on the parties.

LMES shall promptly provide to USEC such records, other information and related assistance that USEC shall reasonably request to enable USEC to complete an audit of

Transferred Participants and their respective benefits, and such other audits as USEC may reasonably complete in connection with the USEC Plan.

4. Notice.

Any notice or other communications required or permitted hereunder shall be in writing and shall be sufficiently given (and shall be deemed to have been duly given upon receipt), if personally delivered or sent by registered or certified mail, return receipt requested, postage prepaid, or by facsimile, addressed as follows:

To USEC:

USEC Inc.
Two Democracy Center
6903 Rockledge Drive
Bethesda, Maryland 20817-1818
Attn: Director, Investments
cc: General Counsel

To LMES:

Lockheed Martin Energy Systems, Inc.
701 Scarboro Road
P.O. Box 2008
Oak Ridge, Tennessee 37830
Attn: Director, Employee Benefits
cc: General Counsel

Any party hereto may change the address to which each such notice or communication shall be sent by giving written notice of such change of address to the other party hereto in the manner above stated.

5. Entire Agreement; Amendment.

This Agreement shall contain the entire understanding and agreement among the parties hereto with respect to the subject matter hereof and thereof and shall supersede all prior agreements made by and among the parties. No alteration, amendment, assignment or modification of any of the terms or provisions of this Agreement shall be valid unless by an instrument in writing signed by each of the parties hereto; *provided*, *however*, that the waiver by any party hereto of compliance with a provision hereof or any breach or default by any other party hereto need to signed only by the party waiving such provision, breach of default.

6. Counterparts

This Agreement may be executed in any number of counterparts each of which shall be an original, but all of which taken together shall constitute one and the same instrument.

7. Successors and Assigns.

Any right and/or interest which is acquired by LMES under this Agreement shall pass directly from LMES to DOE or its designee(s) at the discretion of DOE upon notice to USEC. The obligations and rights of LMES under this Agreement may be transferred, in whole or in part, to DOE or its designee(s) at the discretion of DOE upon notice of such transfer to USEC, and to the extent of such transfer an notice thereof to USEC, LMES shall have no further responsibilities hereunder. Notwithstanding anything in this Agreement to the contrary, in the event that LMES or any successor or

transferee pursuant to this Section 7 is unable to fulfill any of its obligations, financial or otherwise, under this Agreement, then DOE shall be obligated to fulfill such obligations of LMES, or any of its successors or transferees pursuant to this Section 7.

8. Severability of Provisions.

If any provision of this Agreement is invalid, illegal or incapable of being enforced by any rule of law or public policy, all other provisions of this Agreement shall nevertheless remain in full force and effect so long as the economic or legal structure of the transactions contemplated hereby is not affected in any manner adverse to any party. Upon such determination that any provision is invalid, illegal or incapable of being enforced, the parties hereto shall negotiate in good faith to modify this Agreement so as to effect the original intent of the parties as closely as possible in an acceptable manner to the end that the transactions contemplated here by fulfilled.

9. Governing Law.

The Agreement shall be construed and enforced in accordance with the laws of the State of Delaware without giving effect to the conflict of law principles thereof.

10. Captions.

The captions herein are included for convenience of reference only and shall be ignored in the construction or interpretation hereof.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the day and year first above written.

UNITED STATES ENRICHMENT CORPORATION

/s/ Henry Z. Shelton
Name: Henry Z. Shelton
Title: Senior Vice President & CFO

LOCKHEED MARTIN ENERGY SYSTEMS, INC.
/s/ Joseph M. Wolfe, Jr.
Name: Joseph M. Wolfe, Jr.
Title: Vice President and CFO

ACKNOWLEDGMENT AND CONSENT

The undersigned hereby acknowledges that it has read and fully understands the terms and conditions of the foregoing Agreement to which this Consent and Acknowledgment is attached and of which this Consent and Acknowledgment is hereby made a part for all purposes. The undersigned hereby agrees to be bound by such terms and conditions to the extent such terms and conditions are imposed on it by the Agreement and hereby consents to such terms and conditions.

UNITED STATES DEPARTMENT OF ENERGY

By: /s/ William Westrom
Name: William Westrom
Title: Contracting Officer

Date: 6/6/2000